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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT TACOMA

8 SHELIA D SPENSER and WILLIAM E  
9 SPENSER,

10 Plaintiffs,

11 v.

12 DEUTSCHE BANK, NATIONAL  
13 TRUST COMPANY, as Trustee for  
14 FFMLT, Trust 2005FF2, et al.,

Defendants.

CASE NO. C11-5599BHS

ORDER GRANTING  
DEFENDANT'S MOTION TO  
DISMISS

15 This matter comes before the Court on Defendant Northwest Trustee Services,  
16 Inc.'s ("Northwest") motion to dismiss (Dkt. 6). The Court has reviewed the briefs filed  
17 in support of the motion and the remainder of the file and hereby grants the motion for the  
18 reasons stated herein.

19 **I. PROCEDURAL HISTORY**

20 On August 4, 2011, Plaintiffs Shelia and William Spenser ("the Spensers") filed a  
21 complaint against Defendants Deutsche Bank, National Trust Company as Trustee for  
22 FFMLT, Trust 2005FF2; Bank of America, NA; Wells Fargo, NA; Northwest; and  
23 Fairbanks Capital Select Portfolio. Dkt. 1. The Spensers' request for relief is as follows:  
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25 We want to stay the foreclosure until we can find out who is the real  
26 holder of the original note and deed of trust. The lender holding the original  
note and deed of trust produce the originals with wet ink signatures for our  
inspection.

27 *Id.* at 4.  
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1 On August 18, 2011, Northwest filed a motion to dismiss. Dkt. 6. The Spensers  
2 did not respond.

## 3 II. FACTUAL BACKGROUND

4 On or about November 11, 2004, in consideration for a mortgage loan, William  
5 Spenser executed a promissory note (the “Note”) in the amount of \$152,000.00, payable  
6 to First Franklin Financial Corporation (“First Franklin”), and a Deed of Trust in favor of  
7 First Franklin. *See* Dkt. 6 at 10-29 (“Deed of Trust”). The Deed of Trust names First  
8 American as the Trustee, and grants the Trustee the power of sale in the event of default.  
9 *Id.* The Deed of Trust was recorded on November 17, 2004 under Pierce County  
10 Auditor’s No. 200411170934, and encumbers a piece of real property located in Pierce  
11 County, commonly known as 1503 South 11th Street, Tacoma, Washington 98405 (the  
12 “Property”). *Id.*

13  
14 On or about September 2, 2008, First Franklin executed an Assignment of the  
15 Deed of Trust (“Assignment”) whereby all beneficial interest in the Deed of Trust was  
16 transferred to Defendant Deutsche Bank National Trust Company, as Trustee for FFMLT  
17 Trust 2005FF2, Mortgage Pass-Through Certificates, Series 2005-FF2 (“Deutsche  
18 Bank”). *See* Dkt. 6 at 30-31. The Assignment was recorded under King County  
19 Auditor’s No. 201010060273. *Id.*

20 On or about October 9, 2008, as a result of the Spensers’ default on payments due  
21 under the Note secured by the Deed of Trust, the Spensers were sent a Notice of Default.  
22 *See* Dkt. 6 at 32-34.

23 On October 24, 2008, Deutsche Bank recorded an Appointment of Successor  
24 Trustee naming Northwest as Successor Trustee and vesting Northwest with the powers  
25 of the original trustee. *See* Dkt. 6 at 35; *see also* RCW 61.24.010(2). The Appointment  
26 of Successor Trustee was recorded under Pierce County Auditor’s No. 200810240549.  
27 *Id.*  
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1 On or about March 15, 2011, Deutsche Bank, through its agent BAC Home Loans  
2 Servicing, LP, executed a beneficiary declaration stating that

3 Deutsche Bank National Trust Company, as Trustee for the Holders of The  
4 First Franklin Mortgage Loan Trust 2005FF2, Mortgage Pass-Through  
5 Certificates, Series 2005-FF2 is the beneficiary (as defined by RCW  
6 61.24.005(2)) and actual holder of the promissory note or other obligation  
secured by the deed of trust or has the requisite authority under the RCW  
62A.3-301 to enforce said obligation for the above mentioned loan account.

7 *See* Dkt. 6 at 36.

8 On April 29, 2011, Northwest recorded a Notice of Trustee's Sale concerning the  
9 Property under Pierce County Auditor's No. 201104290278. *Id.* at 37-40. The Notice of  
10 Trustee's Sale references the parties to, and recording information of, the Deed of Trust,  
11 and set a sale date of August 5, 2011. *Id.*

12 On August 5, 2011, the Trustee's Sale was postponed to September 30, 2011. *Id.*  
13 at 41-42.

### 14 **III. DISCUSSION**

15 As a threshold matter, failure to respond to a motion may be considered by the  
16 Court as an admission that the motion has merit. Local Rule CR 7(b)(2). The Spensers  
17 did not respond to Northwest's motion and the Court considers this failure as an  
18 admission that Northwest's motion has merit.

19 With regard to the motion, a Rule 12(b)(6) motion may be based on either the lack  
20 of a cognizable legal theory or the absence of sufficient facts alleged under such a theory.  
21 *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Material  
22 allegations are taken as admitted and the complaint is construed in the plaintiff's favor.  
23 *Keniston v. Roberts*, 717 F.2d 1295, 1301 (9th Cir. 1983). To survive a motion to dismiss,  
24 the complaint does not require detailed factual allegations but must provide the grounds  
25 for entitlement to relief and not merely a "formulaic recitation" of the elements of a cause  
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1 of action. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). Plaintiffs must  
2 allege “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 1974.

3 In this case, the Court has read the Spensers complaint liberally and concludes that  
4 they are asserting causes of action for a wrongful foreclosure and for failure to produce  
5 the original note. First, there is no cause of action for “wrongful foreclosure” when no  
6 foreclosure has in fact occurred. *See, e.g., Vawter v. Quality Loan Svc. Corp. of Wa.*, 707  
7 F. Supp. 2d 1115, 1123-24 (W.D. Wash. 2010); *Engel v. First Am. Tit. Ins. Co.*, 2010 WL  
8 3819372 (W.D. Wash.). A foreclosure of the Property has not occurred yet. Therefore,  
9 the Court grants Northwest’s motion and the Spensers’ claim for wrongful foreclosure is  
10 dismissed.

11 Second, courts “have routinely held that [a defendant’s] so-called ‘show me the  
12 note’ argument lacks merit.” *Freeston v. Bishop, White & Marshall, P.S.*, 2010 WL  
13 1186276 (W.D. Wash. 2010) (*quoting Diessner v. Mortgage Electronic Registration*  
14 *Systems*, 618 F. Supp. 2d 1184, 1187 (D. Ariz. 2009) (collecting cases)).<sup>1</sup> The Spensers’  
15 request that the foreclosure proceeding be halted until they are presented with the original  
16 note is a meritless “show me the note” argument. Therefore, the Court grants  
17 Northwest’s motion to dismiss the Spensers’ original note cause of action.

18 Finally, claims that are not based on a proper legal theory should be dismissed  
19 without leave to amend. *Keniston*, 717 F.2d at 1300. Neither of the Spensers’ claims  
20 against Northwest are based on a proper legal theory. Therefore, the Court will not afford  
21 the Spensers an opportunity to amend their complaint.  
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27 <sup>1</sup> The Court’s ruling in *Freeston*, 2010 WL 1186276, was affirmed in a Ninth Circuit  
28 memorandum opinion (Case No. 09-5560BHS, Dkts. 91, 93).

1 **IV. ORDER**

2 Therefore, it is hereby **ORDERED** that Northwest's motion to dismiss (Dkt. 6) is  
3 **GRANTED.**

4 DATED this 30<sup>th</sup> day of September, 2011.

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7 BENJAMIN H. SETTLE  
8 United States District Judge  
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